

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

ORIGINAL
NO. 77-4057

In the
UNITED STATES COURT OF APPEALS
for the Second Circuit

Nos. 77-4057, 77-4067, 77-4068,
77-4073, 77-4074, 77-4075

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
INTERNATIONAL BUSINESS MACHINES CORPORATION,
SECURITIES INDUSTRY AUTOMATION CORPORATION,
UNITED SYSTEM SERVICE, INC.,
AERONAUTICAL RADIO, INC.,
AIR TRANSPORT ASSOCIATION OF AMERICA,
TELENET COMMUNICATIONS CORPORATION,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Intervenors.

On Petition for Review of Orders of
the Federal Communications Commission

REPLY BRIEF OF AERONAUTICAL RADIO, INC. AND
AIR TRANSPORT ASSOCIATION OF AMERICA

Petitioners in No. 77-4073

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On Petition for Review of Orders of
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REPLY BRIEF OF AERONAUTICAL RADIO, INC. AND
AIR TRANSPORT ASSOCIATION OF AMERICA

Petitioners in No. 77-4075

I.

ARINC IS AGGRIEVED BY THE COMMISSION'S
ACTION WHICH HELD TARIFF PROVISIONS RECOGNIZING
ARINC'S CUSTOMER STATUS TO BE UNLAWFUL

Respondents do not appear to dispute that ARINC is entitled to service as a single customer but argue that ARINC is not aggrieved by the FCC's decision. (FCC Br. at 53-55.) The basis for this argument is Respondents' assertion that "ARINC will be eligible under unlimited resale and sharing to continue to operate precisely as it has in the past." (FCC Br. at 54.) This glib statement presupposes, however, that there will, in fact, be "unlimited resale and sharing," and ignores the possibility that this Court will set aside or modify that part of the Commission's order which requires unlimited resale and sharing, possibly on procedural grounds, as urged by other petitioners in this case.

If, for example, this Court should agree with AT&T that the FCC's prescription of unlimited sharing and resale should be set aside because an evidentiary hearing was not held, ARINC would lose its right to operate as it does at present unless the Court also sets aside the FCC's order holding the single customer provisions unlawful. Therefore, the FCC's action makes ARINC's customer status subject to the condition that unlimited sharing and resale be successfully implemented. Yet, as shown in ARINC's and ATA's Petitioners'

Brief, ARINC has a right to obtain service for ATA's members regardless of what policy is ultimately adopted on sharing and resale, and, therefore, ARINC and ATA's members have suffered a "legal wrong" and are "aggrieved" within the meaning of the applicable review statutes.

5 U.S.C. § 702, 28 U.S.C. § 2344.*

Even if the FCC's order regarding sharing and resale is sustained, ARINC is aggrieved by the threatened loss of Telpak. Although Respondents' Brief (at 54)

* The only case cited by Respondents, Warth v. Seldin, 422 U.S. 490 (1975), in no way supports Respondent's claim that ARINC and ATA are not aggrieved. In Warth v. Seldin, the Supreme Court stated that "[a] federal court's jurisdiction . . . can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action'" Id. at 499 (citations omitted). ARINC is certainly "threatened" by the loss of customer status as long as the validity of the FCC's resale and sharing order remains in litigation. Apart from this standard, the Court recognized two further limitations on standing, neither of which pertain to ARINC or ATA in this case. First, the Court recognized that "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone does not warrant exercise of jurisdiction." Id. at 499 (citations omitted). Secondly, the Court restated the proposition "that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Id. at 499 (citations omitted).

indicates that AT&T was ordered to cancel Telpak in Docket No. 18128, in fact, the FCC reversed that order on June 2. See FCC News Report No. 13036. AT&T, however, has not withdrawn its tariff revisions cancelling Telpak and has stated in explanation of the cancellation of Telpak "that Telpak cannot exist in a resale and sharing environment." AT&T Transmittal No. 12714.

Finally, although Respondents' Brief asserts that "ARINC will be eligible under unlimited resale and sharing to continue to operate precisely as it has in the past," ARINC has already been threatened with a restriction in its rights to service. On March 23, 1977, AT&T filed tariff revisions purporting to implement unlimited resale and sharing. AT&T Transmittal No. 12715. These tariff revisions expressly deny all AT&T customers the right to share switched voice private line service for communications among different sharers. This restriction, if allowed to become effective,* would take away from ARINC the right it now has under the single customer tariff provision to order a switched voice network for communications to, from, and between air carriers.

* ARINC and ATA have petitioned the FCC to reject this aspect of AT&T's tariff filing.

II.

THE QUESTION OF ESTABLISHING NEW TARIFF
ARRANGEMENTS FOR OTHER CUSTOMERS IS NOT
RIPE FOR REVIEW

Intervenor, American Trucking Associations, Inc., (Truckers) indicates that it agrees with the FCC's decision on the single customer tariff provisions, but provides no legal argument whatsoever in support of that decision (Truckers' Brief at 27-30). The Petitioners' Brief of ARINC and ATA shows that the FCC's decision on the single customer provisions is invalid as a matter of law, and the Truckers' brief makes no answer to this showing.

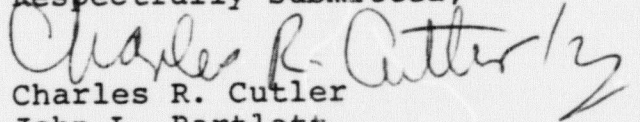
Also, without legal support, the Truckers ask this Court, if it reverses the FCC's single customer decision, on its own motion to order the FCC to require AT&T, in effect, to accord ATA single customer status. ARINC and ATA have not opposed any claim by the Truckers that it may be entitled to service and do not do so now. (See ARINC and ATA Reply Comments at 9-10, J.A. 1235-36.) However, it is clearly not the role of this Court, in the first instance, to order any particular form of communications service for the trucking industry in the absence of a hearing and decision by the FCC on that question. Thus,

the Truckers simply do not present an issue which is ripe for judicial review. See Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

CONCLUSION

For the reasons given above and in the Petitioners' Brief of ARINC and ATA, the FCC's orders should be reversed and set aside insofar as they find tariff provisions recognizing ARINC's single customer status to be unlawful.

Respectfully submitted,


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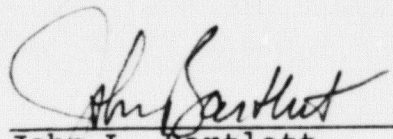
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Respondents.	)	
	)	
AMERICAN TRUCKING ASSOCIATIONS, INC., <u>et al.</u> ,	)	
	)	
Intervenors.	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 6, 1977, the Reply Brief of Aeronautical Radio, Inc. and Air Transport Association of America, Petitioners in No. 77-4075, was served by mailing two copies, postage prepaid, to counsel for each party separately represented as indicated on the attached service list.


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